

MEMORANDUM OF LAW

DATE: September 25, 1995

TO: Councilmember Scott Harvey, Council District 2

FROM: City Attorney

SUBJECT: Student Charity Car Washes - Stormwater Discharge Regulations

By memorandum dated September 5, 1995 you have requested a legal opinion concerning the application of the Stormwater Management and Discharge Control Ordinance (San Diego Municipal Code ("SDMC") sections 43.0301-43.0314) to fund-raising car wash activities of student organizations of the City's schools.

Issue

Under San Diego Municipal Code section 43.0305(b)(8), are student charity car washes a "non-commercial" activity, thereby exempt from the prohibition against non-stormwater discharges to the stormwater conveyance system?

Short Answer

The answer depends on the facts. It is our opinion that most small-scale, limited duration student car washing events qualify as "non-commercial washing of vehicles" under SDMC section 43.0305(b)(8). However, there are conceivable fact scenarios under which student charity car washes would not qualify for the exemption. Facts to consider are the scale, frequency, location, and cumulative effects of the car washes, and whether there are any interests involved which are not truly non-profit. If commercial attributes are present, or if discharges contribute to violations of receiving water standards, the exception will not apply. Whether exempt or not, all persons washing cars should employ practical measures to control non-stormwater discharges to the stormwater conveyance system.

The Pollutant Discharge Prohibition; Exceptions

Discussion should begin with review of the definitions of certain terms. The term "Stormwater" is defined in SDMC section 43.0302 to mean "surface runoff and drainage associated with storm events and snow melt that is free of Pollutants to the maximum extent practicable"; "Non-Stormwater" is defined to mean "any discharge to the Stormwater Conveyance System that is not entirely composed of Stormwater"; "Stormwater Conveyance System" means "municipal and natural facilities .

. . by which Stormwater may be conveyed to waters of the United States .
. . including . . . natural and artificial channels and storm drains."

With these definitions in mind, SDMC section 43.0304 provides that, with certain exceptions, "it is unlawful for any person to discharge Non-Stormwater to a Stormwater Conveyance System." SDMC section 43.0305 contains a list of exceptions from the prohibition against the discharge of Non-Stormwater to the Stormwater Conveyance System. The exception relative to car washing is found at Section 43.0305(b)(8), which allows "non-commercial washing of vehicles," provided that such non-commercial washes "do not cause or contribute to the violation of any Plan Standard" for receiving waters.

Background for City's Ordinance

In the most basic sense, the City's ordinance was enacted to comply with amendments to the federal Clean Water Act which were part of the Water Quality Act of 1987. Clean Water Act Section 402(p); 33 U.S.C. Sections 1342(p)σ. These amendments required the Environmental Protection Agency to promulgate regulations for National Pollutant Discharge Elimination System (NPDES) permits for stormwater discharges. As a result of the federal legislation, municipalities are now required to obtain NPDES permits for discharges from their stormwater conveyance systems, i.e., their storm drains and ancillary natural drainages which convey runoff to receiving waters. The EPA's proposed regulations were first published in late 1988 and became effective in 1990. Under the regulatory structure of the Clean Water Act, responsibility for administration of the NPDES stormwater permit regulations is delegated to the California Regional Water Quality Control Board (RWQCB), which has responsibility for developing and enforcing the terms of the permits.

In 1990, shortly before the EPA stormwater regulations became effective, the San Diego Region of the RWQCB adopted Order 90-42, titled "Waste Discharge Requirements for Stormwater and Urban Runoff from the County of San Diego, the Incorporated Cities of San Diego County, and the Unified Port District." This Order 90-42 (presently pending its required five-year update and reissue) constitutes NPDES Permit No. CA0108758, a regional permit that includes the City of San Diego's stormwater conveyance system. Requirement III.A.7 at page 14 of the permit requires the City to "(e)nact legislation and ordinances as necessary to ensure compliance with the stormwater management programs and the implementation plans." The City's ordinance was enacted in direct response to this mandate; it was intended to comply with the condition of the NPDES permit which requires the City to have the legal authority to control non-stormwater discharges to its stormwater conveyance system.

Because Order 90-42 constitutes a county-wide NPDES stormwater discharge permit, the City of San Diego and other municipal

jurisdictions in San Diego County which are likewise subject to permit mandates participated in a regional committee for the purpose of developing consistency in their stormwater ordinances. The co-permittee committee was headed by staff of the RWQCB, and was attended by staff of several local agencies and other interested parties such as representatives of the Environmental Health Coalition. The City's ordinance was developed based on the comments and conceptual approval of this regional committee. The ordinance was then sent to the Transportation and Land Use Committee for several hearings, and was subsequently approved by the City Council in 1993. It is noted that the Chamber of Commerce also provided substantial comment before the ordinance was adopted.

The NPDES permit, and hence the ordinance, are primarily directed at eliminating pollutant discharges to the stormwater conveyance system and ensuring that "Plan Standards" are not violated. These Plan Standards provide numerical and narrative water quality standards for receiving waters in the region. The Plan Standards include requirements set forth in comprehensive orders of the State Water Resources Control Board and the RWQCB; specifically the Plan Standards include the "Basin Plan" (Comprehensive Water Quality Control Plan for the San Diego Basin); the "California Ocean Plan" (Water Quality Control Plan for Ocean Waters of California); the "Enclosed Bays and Estuaries Plan" (Water Quality Control Plan for Enclosed Bays and Estuaries of California); and the "Inland Surface Water Plan" (Water Quality Control Plan for Inland Surface Waters of California). These standards apply to the quality of "receiving waters," (synonymous with "waters of the United States" as that term appears in the Clean Water Act) which are defined for purposes of the stormwater ordinance as " . . . surface bodies of water which serve as discharge points for the stormwater conveyance system. Receiving waters specifically include creeks, rivers, reservoirs, lakes, lagoons, estuaries, harbors, bays, and the Pacific Ocean." SDMC Section 43.0302.

While there are numerical and narrative Plan Standards for the quality of receiving waters, the RWQCB has not established any definite limitations for constituents in stormwater discharges.

The NPDES permit states the following in Finding No. 25:

Due to the enormous variability in stormwater quality and quantity and the complexity of urban runoff, this Order does not contain numerical limitations for any constituents. The impact of stormwater and urban runoff discharges on water quality of receiving waters has not been fully determined. Extensive water quality monitoring and

analysis of the data are essential to make that determination. This Order requires permittees to monitor the discharges and to analyze the data.

The City's Stormwater Management Program is complying with this requirement to monitor and analyze stormwater discharges. While these efforts are ongoing, the substantive discharge control requirements imposed by the ordinance have been enacted in view of parallel requirements in the NPDES permit. The NPDES permit and the ordinance seek to attain this objective by prohibiting all non-stormwater discharges to the stormwater conveyance system, unless such discharges are categorically exempted as non-illicit. It is important to note, however, that discharges which otherwise would be categorically exempt are prohibited if they contribute to the violation of Plan Standards. Non-Illicit Discharges: "Non-Commercial" vs. "Individual Residential" Car Washing

SDMC section 43.0305(b)(8) exempts "non-commercial washing of vehicles" from the discharge control requirements. The NPDES permit contains a parallel limited exception for car washing activities, although the permit terminology is different in that it excludes from the scope of prohibited discharges "individual residential washing of vehicles" rather than "non-commercial washing of vehicles." NPDES Permit, Requirement VIII.B p. 17. Importantly, both versions of the car wash exemption language are subject to the proviso that the exception applies only if the discharges "do not cause or contribute to violations of water quality standards," and provided that the discharges "are not significant contributors of pollutants to waters of the United States." Id.

Although the term "individual residential car washing" appears in the NPDES permit as a definitive exclusion from the definition of "illicit discharge," it has evidently been taken out of context from a singular reference in the Code of Federal Regulations (CFR). The sole federal reference to the term "individual residential car washing" is made at 40 CFR section 122.26(d)(2)(iv)(B)(1). The term appears there not in the context of describing what is categorically excepted from the meaning of "illicit discharge," but instead it appears in the context of describing NPDES permit application requirements. The regulation requires permit applicants to describe a program for implementation and enforcement of an ordinance which prohibits all illicit discharges to the stormwater conveyance system. The regulation requires that certain categories of non-stormwater discharges "shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States." (Emphasis added.) Included in these categories is "individual residential car washing." Thus, the term is not used in the CFR to define an exception to "illicit discharge";

rather the term is merely used to refer to a category of discharge that needs to be addressed as part of an enforcement program (to be described in a municipality's NPDES permit application), if the municipal permittee identifies that category of discharge as a source of pollutants to receiving waters. Therefore, the reference to "individual residential car washing," as it appears in the CFR, is not controlling in the analysis of this issue. The analysis should instead focus on the intent for any exceptions from the meaning of "illicit discharge": Whether the excepted category of discharge is a significant contributor of pollutants to receiving waters.

With respect to meeting the intent for an exception to "illicit discharge," the distinction between the literal meanings of "individual residential" and "non-commercial" can become academic under various conceivable factual scenarios. For example, under the "individual residential" language, it is doubtful that the intent of the exception would be met if mobile commercial auto detailers were permitted to regularly wash cars at individual residences without being subject to the discharge controls. On the other hand, in using the term "non-commercial," it is doubtful that the limitation was intended to prohibit non-stormwater discharges where one pays a neighbor's child to wash a car at one's residence. In these examples it is evident that the intent behind the exception is more important than the literal distinction in terms.

The deviation in terminology for the exemption from "individual residential" (NPDES permit) to "non-commercial" (City ordinance) appears to have been purposeful, although we could not locate any documentation of how this change came about during the development of the ordinance. City staff recollects that the change in language was discussed and approved in concept by the regional committee, including RWQCB staff. We believe that the change was made because of concern that the NPDES permit language would allow mobile commercial auto detailing companies to discharge into the stormwater conveyance system while working at individual residences. This would have been contrary to the intent of the exemption. There was also a concern about limiting the exemption to residences (e.g., a concern was raised that a person should be able to wash one's own car at a place other than their residence). For these reasons, the term "non-commercial" was apparently substituted for the term "individual residential." While there is no record documenting this change, it accommodates the above concerns. We believe that the ordinances of certain co-permittees were adopted with the same "non-commercial" terminology.

The Meaning of "Commercial"

Thus we are left to consider the literal language of the ordinance, which exempts "non-commercial washing of vehicles."

The meaning of the word "commercial" is discussed in two earlier

Memoranda of Law issued by this office in different factual contexts. In a Memorandum of Law dated January 3, 1989, the issue was whether the Municipal Code prohibition against using the City Seal for any "commercial purpose" applies to the use of the seal on mementos given to community volunteers to acknowledge their efforts. We concluded that the prohibition does not apply to the use of the seal on such mementos because no profit motive intrinsic to a commercial purpose existed. The term "commercial purpose" refers to commerce, trade, business, industry or enterprise having financial profit as the primary aim. *Siegel v. City of Oakland*, 79 Cal. App. 3d 351, 358 (1978).

Similarly, in a Memorandum of Law dated September 8, 1988, the question concerned the applicability of City Charter section 55.1 to non-profit boating and recreation clubs. Charter section 55.1 limits "commercial" leases in Mission Bay Park to no more than twenty-five percent of its dedicated area. In that instance it was also noted that "commercial" means "of, in, or relating to commerce" and "from the point of view of profit." We concluded that "it does not appear to us that leases to non-profit organizations can ordinarily be classified as 'commercial' leases since such lessees obviously do not operate 'from the point of view of profit.'" We pointed out, however, that "it is not inconceivable that a non-profit lessee could be considered a commercial lessee in certain circumstances. For example, if Sea World became a non-profit lessee, or if a hotel were leased to a non-profit organization, it would seem that the mere absence of a 'profit' motive would not justify a conclusion that such lessees would not constitute 'commercial' lessees within the spirit and intent of Charter section 55.1."

The opinion concerning the Mission Bay leases is instructive to the present issue because it points out the factual relativity inherent in application of the term "commercial" to non-profit organizations. It maintains focus on the spirit and intent of the law by explaining that non-profit organizations may or may not be deemed "commercial" within the intent of that law, depending on the circumstances. It is likewise appropriate in the present case to maintain focus on the spirit and intent of the language pertaining to "non-commercial car washing."

The exception of any car wash discharges from the definition of the term "illicit discharge" has its origin in the NPDES permit, which, as has been noted, excepts "individual residential" car washing from the discharge prohibitions. Under the tacit auspices of RWQCB staff, this exception developed into an exemption for "non-commercial" car washing under the City ordinance. Under either version, the apparent intent is to narrow the applicability of the exemption by reference to terms which in some way serve to restrict and contain the scale of the car washing activity, the frequency of such activity, the location of such activity, and the cumulative effects of the activity.

Conclusion

Since we have previously opined that "commercial" means having financial profit as the primary aim, we conclude that "non-commercial washing of vehicles" necessarily excludes car washing that does not have profit as the primary aim. Most small-scale, periodic, limited duration non-profit student car washes will come within the meaning of the exception provided by SDMC section 43.0305(b)(8). However, we are quick to caution that this remains a highly fact-dependent conclusion, and that the "non-commercial" exemption is unavailable if scale, frequency, location, or cumulative effects of student charity car wash events are such that discharges materially depart from those which are characteristic of residential car wash discharges, or if the student charity car wash events otherwise manifest attributes of "for profit" enterprise. Further, the exception will be inapplicable if any student charity car wash discharge contributes to the violation of a Plan Standard.

Postscript: Best Management Practices Required

Regardless whether the student charity car washes are non-commercial and therefore excepted from the prohibition of the ordinance against the discharge of non-stormwater, they nevertheless are subject to the requirement set forth in SDMC section 43.0308(e) that "Best Management Practices" be maintained to control non-stormwater discharges to the stormwater conveyance system. The term "Best Management Practices" also stems from the Clean Water Act and its regulations, and is defined in the NPDES permit and the ordinance to mean "schedules of activities, prohibitions of practices, general good housekeeping practices, pollution prevention and educational practices, maintenance procedures, and other management practices to prevent or reduce to the maximum extent practicable the discharge of pollutants directly or indirectly to waters of the United States." In short, "Best Management Practices" means taking reasonable and practicable measures to eliminate or attenuate non-stormwater discharges to the stormwater conveyance system.

To the extent feasible, student charity car wash events should be staged in a manner which avoids or minimizes to the greatest extent practicable the discharge of pollutants to the stormwater conveyance system. Some suggestions in this regard can be given by the Stormwater Management Program. Detailed explanations are available concerning alternatives for selection of sites, cleaning agents, washing methods, and containment, collection, and disposal procedures. Suggestions may also be offered concerning possibility of cooperation between charity groups and commercial car wash owners or operators; such alliances might make facilities that are equipped for Best Management Practices available to charities for their fund raising activities. To summarize this point, even if the charity events are excepted from the discharge

prohibition, they do not have "carte blanche" to discharge non-stormwater to the stormwater conveyance system. They must utilize Best Management Practices to control and, if practicable, completely eliminate their non-stormwater discharges to the stormwater conveyance system. We believe that lawful solutions acceptable to all interests can be reached, and that open dialogue and education will surely assist this objective.

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By

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cc Casey Gwinn

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